Vermont Bar Examination
February, 2011
Model Answer 3

1. Dugway must foreclose its mortgage. To foreclose a mortgage in Vermont, a mortgagor must file a complaint in the Superior Court for the county in which the property is located. The complaint must name the mortgagor and mortgagee, the date of the mortgage deed, a description of the premises, the debt claimed, and attorney's fees claimed, the condition breached in the mortgage, the names of all parties with an interest in the property and the recording information for their interest, and a demand for foreclosure. The complaint must be recorded in the town clerk's office in the town where the property is located. The foreclosure complaint must be personally served with a summons and a notice to the homeowner, because Allison resides on this property. The notice must follow a form established by the Rules of Civil Procedure that provides homeowners with notice and contact points to obtain free advice on keeping the home. 12 V.S.A.§4523; V.R.C.P. 80.1

2. Because this is a foreclosure action, Allison must file a verified answer, or an answer supported by affidavit to preserve any defenses she may have to the foreclosure. This answer must be filed within twenty days of the service of the foreclosure complaint. If Allison wishes to appeal from any foreclosure decision, she must file a motion with the court requesting permission to appeal within ten days of the entry of judgment. If Allison enters her appearance in the foreclosure case or makes a timely request, Dugway may need to participate in a mediation to assure compliance with the requirements of the federal Home Affordable Modification Program ("HAMP"). This program applies to foreclosures of individual residences, such as Allison's, provided that the value of the residence is less than the amount established by the program (approximately $728,000.00); the homeowner has suffered some sort of hardship, such as the loss of a job; and the mortgage payment is roughly 1/3rd of the homeowner's adjusted gross monthly income; and the lending institution is a recipient of money under the TARP program. The court will order mediation if Allison enters an appearance in the case or requests mediation prior to four months after the foreclosure judgment is entered. The mediation is governed by statute, and requires mortgagees such as Dugway to use and consider reinstatement, modification, forbearance and short sales in compliance with HAMP. 12 V.S.A. § 4631 et seq.

3. Vermont law requires that deeds be acknowledged in the presence of a notary (or another official authorized by law to accept such acknowledgements. The presence of a notary as a witness is not sufficient; the acknowledgement itself must occur, and the notary must sign a statement of the acknowledgement. 27 V.S.A. § 341. Vermont law also provides, however, that if a deed is recorded for fifteen years, it is valid after the expiration of the fifteen years. Thus, the deed to Allison was valid after the passage of fifteen years. Even though Dugway acquired its mortgage prior to the passage of these fifteen years, any question about the title acquired by Dugway was resolved by the passage of the fifteen year period. 27 V.S.A. § 348.

4. Carla may claim rights to a prescriptive easement and an easement by necessity. To establish an easement by necessity, one must show that (1) there was a division of commonly owned land, and (2) the division resulted in creating a landlocked parcel. See *Traders, Inc. v. Bartholomew*, 142 Vt. 486, 492, 459 A.2d 974, 978 (1983). In this case, Bill owned both parcels prior to dividing them. While access to the back lot may have been inconvenient, the logging road did provide an alternate access. Thus, it does not meet the standards for an easement by necessity.

Carla appears to meet the standards for a prescriptive easement. The standards for such an easement are: use of land for fifteen years that is open, notorious, continuous, and hostile or under a claim of right. These elements are similar to the requirements for adverse possession. Unlike adverse possession, one can acquire a prescriptive easement without making exclusive use of the property in question. Prescriptive easements, however, are limited in the scope of the interest acquired. The scope of the easement is co-extensive with the scope of the action that led to the acquisition of the easement. The owner of a prescriptive easement cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon. Although the use may vary in some degree from the use that gave rise to the prescriptive easement, the use must be within the range of the uses made by the adverse user. *Schonbeck v. Chase,* 2010 Vt. 91 ¶¶ 8-9. The use of a previous property owner (Bill) is tacked onto the use of the current owner (Carla) for purposes of meeting the fifteen year period.

While Carla has only made intermittent use of the driveway, the prescriptive easement period was likely complete once she and Bill had used the driveway as a residential access for fifteen years. If the court determines that there is no material increase in the burden imposed by allowing residential use on a year-round basis, Carla would receive a prescriptive easement for such use.

Carla cannot materially increase the scope of the use of the easement beyond that acquired during the fifteen year prescriptive easement period. Carla cannot use the driveway for her planned day care center, because the increased traffic would likely be found by a court to materially increase the burden on the prescriptive easement.

Vermont Bar Examination
Model Answer
Question 5

1. Within 180 days preceding the date Dan files for bankruptcy protection, he will be required to obtain credit counseling from an approved agency. *See* 11 U.S.C. § 109(h). Dan will also want to gather all information necessary to prepare a schedule of assets and liabilities, a schedule of current income and current expenses, a statement of monthly net income, a statement of his financial affairs, copies of all payment advices or other evidence of payment received within 60 days of filing for bankruptcy, and a statement of his intention with respect to the retention or surrender of property that is secured by property of Dan's bankruptcy estate. *See* 11 U.S.C. § 521 (a)(1) & (2).

Also, if Dan elects to file for relief under Chapter 7, he will have to establish through means testing that he does not have the resources to fund a plan under Chapter 13.

2. The following will happen if Dan files for Chapter 7 bankruptcy relief:

House: With the house still worth $300,000 and Dan owing ABC Bank $240,000, he has $60,000 of equity in the house, which he will be able to exempt since Vermont's homestead exemption is $125,000. Dan will also want to make sure that he elects to use the exemptions under Vermont Law so that his $60,000 in equity is fully exempt from inclusion in his Bankruptcy estate. However, if Dan wants to keep the house, he will have to either renegotiate with the bank (likely through a reaffirmation agreement or a federally approved loan modification) or redeem it from the bank (*i.e.*, pay off ABC Bank). Otherwise, the Bank will be able to get relief from the automatic stay and foreclose on the house.

Aunt Ada's Loan: Since Aunt Ada did not record a mortgage deed securing Dan's promissory note in the land records, she is a general unsecured creditor. She will receive what all other general unsecured creditors receive, if anything. However, Dan will have no legal obligation to pay back his aunt as his debt to her will be discharged.

Car: Dan is required to tell the car company whether he will retain or surrender the car. If he wishes to retain it, he must either redeem it (*i.e.*, pay off the outstanding car loan) or reaffirm his debt secured by the car. A reaffirmation agreement must be filed within 45 days after the first meeting of creditors. Dan may be required to show he can overcome any presumed undue hardship his car payment may cause. By entering into a reaffirmation agreement, Dan agrees that any debt or deficiency he owes the car company will not be discharged.

Student Loan: There is nothing in the fact pattern to suggest that excepting this debt from discharge will impose an undue hardship on Dan. Therefore, pursuant to 11 U.S.C. § 523 (a)(8), this debt – although unsecured – is excepted from discharge, making Dan liable for his student loans despite filing for bankruptcy relief.

Credit Card Debt: There is nothing in the fact pattern to suggest that Dan incurred any of this debt through the purchase of luxury items within the six months before his filing. So, the credit card companies will receive what all other general unsecured creditors receive with the balance being discharged as general unsecured debt.

3. To be eligible to file for Chapter 13 relief, Dan needs to have regular income to fund a Chapter 13 plan; his unsecured debts must be less than $360,475 and his secured debts must be less than $1,081,400. *See* 11 U.S.C. § 109(e). The debt limits do not pose a problem. However, while Dan had regular income until February 2010, since then, he has not. Thus, unless he can secure a source of regular income going forward (e.g., getting a job and/or renting out the other unit), Dan may not be eligible to be a Chapter 13 debtor.

4. If Dan is able to file for Chapter 13 relief, the following will likely occur with his assets and debts: Dan will have to propose a Chapter 13 plan, which will be for a term of three to five years depending on his projected "disposable income". Also, Dan's unsecured creditors will have to receive as much under the Chapter 13 plan as they would under a hypothetical Chapter 7 liquidation. Under the plan:

House: Dan will be able to spread out his missed mortgage payments over the life of the plan. In addition, Dan will have to make his regular monthly mortgage payments to the Chapter 13 trustee who will distribute those payments to ABC Bank. These are conduit payments required in the bankruptcy court in Vermont.

Aunt Ada's Loan: This is a general unsecured debt. Aunt Ada will receive whatever dividend general unsecured creditors will receive under Dan's Chapter 13 plan. If Dan successfully completes his plan, any balance due Aunt Ada will be discharged.

Car: Because Dan's car loan was taken more than 910 days before Dan will file for bankruptcy, he may be able to cram down the car company. *See* 11 U.S.C. § 1325(a)(5) and "hanging paragraph". So, if the value of the car securing the car loan is below $5,000 (which it is under the fact pattern, *i.e.*, $3,000), Dan will be required to pay that value, with interest, over the term of the Chapter 13 plan. Any amount over the cram down value will be discharged if Dan successfully completes the Chapter 13 plan.

Student Loan: If Dan included a provision in his Chapter 13 plan that excepting his student loan debt from discharge would be an undue hardship, the plan was properly served on the student loan provider, and the provider did not object, he could have the student loan discharged. However, it is not likely the bankruptcy court in Vermont would confirm such a plan. To properly seek a discharge of a student loan, one should commence an adversary proceeding seeking a determination of undue hardship. However, this is a very difficult burden to sustain and, given the limited fact pattern, it is unlikely Dan could make the requisite showing. Therefore, Dan will continue to be liable for his student loan debt even if he successfully completes his Chapter 13 plan.

Credit Card Debts: There is nothing in the fact pattern suggesting that Dan incurred any of this debt through the purchase of luxury items within the six months before his filing. So, as general unsecured creditors, the credit card companies will receive the same dividend as the other general unsecured creditors, with the balance being discharged upon Dan's successful completion of his Chapter 13 plan.